

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENNETH S. WELLESLEY
Claimant

VS.

UNITED PARCEL SERVICE, INC.
Respondent

AND

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. 1,042,741

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 5, 2009, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts. Michael H. Stang, of Mission, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment, finding that the record did not indicate any recommendation for further medical treatment. Further, the ALJ found that because claimant is not under medical treatment for his vocational injury, any work restrictions imposed by Dr. Michael Poppa are permanent in nature and claimant is, therefore, not entitled to temporary total disability benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 9, 2009, Preliminary Hearing and the exhibits and the transcript of the March 23, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends the record shows that he sustained an accidental injury that arose out of and in the course of his employment. Accordingly, he asks the Board to

reverse the ALJ's preliminary decision and remand the case to her with instructions to authorize Dr. Varghese to provide claimant with medical treatment and to award temporary total disability benefits beginning July 29, 2008, and continuing until claimant is returned to light duty or back to work.

Respondent argues the Board does not have jurisdiction over the issues of medical treatment and temporary total disability benefits. In the event the Board finds it has jurisdiction over this appeal, respondent argues that claimant did not prove his present need for medical treatment is the result of a work-related accident suffered July 28, 2008. Respondent further argues that claimant is not entitled to temporary total disability benefits from July 29, 2008, and continuing.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over this appeal?

(2) If so, did claimant prove his current need for medical treatment is the result of a work-related accident suffered July 28, 2008, or that he is entitled to temporary total disability benefits from July 29, 2008, and continuing?

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2008 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the

proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,¹ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.²

ANALYSIS

Claimant's Application for Review of Preliminary Decision Before the Appeals Board and his brief to the Board argue that the issues on appeal are whether claimant sustained an accidental injury on July 28, 2008, that arose out of and in the course of his employment with respondent and whether his current need for medical treatment is related to that work-related accident. The Board would have had jurisdiction over those issues. However, the ALJ's Preliminary Decision neither finds that claimant did not suffer personal injury by an accident arising out of and in the course of his employment with respondent nor that claimant's need for medical treatment is not related to his accident at work. Rather, the ALJ denied claimant's request for medical treatment because of a lack of evidence in the record that additional medical treatment was necessary. Under K.S.A. 44-534a(a)(2), the ALJ has the jurisdiction to make that decision and the Board does not have jurisdiction over that decision on appeal from a preliminary hearing order. Likewise, the Board does not have jurisdiction at this juncture of the proceedings over the issue of whether claimant is temporarily and totally disabled and entitled to temporary total disability benefits.

CONCLUSION

The Board is without jurisdiction over the issues in this appeal.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal from the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated November 5, 2009, is dismissed.

¹*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

²See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

IT IS SO ORDERED.

Dated this _____ day of March, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge